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No. 90-18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT D. GILMER,

Petitioner,

—v.—

INTERSTATE/JOHNSON LANE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF SECURITIES INDUSTRY ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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PRELIMINARY STATEMENT

The Securities Industry Association, Inc. ("SIA") submits this brief as *amicus curiae* in support of the Respondent, and urges this Court to affirm the decision of the United States Court of Appeals for the Fourth Circuit in *Gilmer v. Interstate/Johnson Lane Corporation*, 895 F.2d 195 (4th Cir. 1990). Pursuant to Rule 37.3 of the Rules of this Court, the written consents of Petitioner Robert D. Gilmer and Respondent Interstate/Johnson Lane Corporation have been obtained and are being filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

SIA is the principal trade association of the securities industry. It has as members more than six hundred securities firms in the United States and Canada.

The rules and registration applications of the self-regulatory organizations in the securities industry, including the New York Stock Exchange, Inc. ("NYSE"), require arbitration of employment and termination disputes between securities firms and registered representatives. These disputes can involve claims arising under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*. This Court's decision on whether arbitration of such claims can be compelled pursuant to written agreement and to self-regulatory organization rules will thus have a substantial impact upon SIA, its member firms and those associated with them.

SIA firmly believes that the Fourth Circuit was correct in its interpretation of prior decisions of this Court, of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. (the "Arbitration Act"), and of the legislative history of the ADEA in directing enforcement of the arbitration agreement in this case.

STATEMENT OF THE CASE

SIA defers to the statement of prior proceedings and of the facts underlying this dispute contained in the brief of the Respondent.

SUMMARY OF ARGUMENT

Petitioner's arguments ignore the recent sea-change in judicial attitudes toward arbitration. In a series of decisions since 1985 (largely involving securities arbitration), this Court has put aside unfounded suspicion of the arbitral process and has unambiguously mandated enforcement of agreements to arbitrate disputes whenever possible.

The mere fact that a statutory right is in issue does not preclude the enforceability of an arbitration agreement. *See, Rodriguez De Quijas v. Shearson/American Express, Inc.*, ____ U.S. ____, 109 S.Ct. 1917 (1989) (claims under Securities Act of 1933); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (claims under Racketeer Influenced and Corrupt Organizations Act, Securities Exchange Act of 1934); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust claims). Unless Petitioner can show a legislative intent to preclude arbitration of claims under the ADEA, his arguments must fail. *See, Mitsubishi*, 473 U.S. at 628. Petitioner has not met his burden. He has not, and cannot, point to any legislative history of the ADEA to support his position. Nor has he met his burden merely by pointing to Title VII cases that have declined to enforce arbitration agreements. Those cases are distinguishable from this one. (POINT I)

Petitioner similarly fails to establish that the policies underlying the ADEA are inconsistent with arbitration of claims under the ADEA. Petitioner's arguments in this regard amount to attacks on the efficacy and fairness of the arbitral process itself. Those arguments have been rejected by this and numerous other courts in recent decisions involving arbitration generally and securities arbitration in particular. As those decisions have found, the securities arbitration process, as currently constituted and as regulated by the Securities and Exchange Commission ("SEC"), is not only fair but offers significant benefits, including speedy access, relative informality and broader evidentiary scope, that can be of benefit to a claimant employee. (POINT II)

Finally, there is no merit in the arguments of various *amici curiae* in support of Petitioner, who question for the first time on this appeal the applicability of the Arbitration Act. Neither the statutory language nor the case law is on their side. While the asserted statutory exclusion refers to employment contracts, the arbitration provisions in this case are not contained in an employment contract. Moreover, this Court, among others, has applied the Arbitration Act to employees

of securities firms. *Perry v. Thomas*, 482 U.S. 483 (1987). (POINT III).

ARGUMENT

POINT I

CONGRESS DID NOT INTEND TO PRECLUDE BINDING ARBITRATION OF ADEA CLAIMS

During the last decade, this Court has repeatedly recognized a "federal policy favoring arbitration." *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983); *see also, e.g., McMahon*, 482 U.S. 220, 226 (1987). The Court has stated that the "federal substantive law of arbitrability" counsels

> that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract itself or an allegation of waiver, delay, or a like defense to arbitrability.

Mitsubishi, 473 U.S. 614, 626 (quoting *Moses H. Cone Memorial Hospital*, 460 U.S. at 24-25).

In *Mitsubishi*, a case brought under the Sherman Act, 15 U.S.C. § 1 *et seq.*, the Court refused to infer from the Arbitration Act a presumption against the arbitration of statutory claims. At the same time it recognized that the Arbitration Act embodies a policy which "guarantee[s] the enforcement of private contractual arrangements." 473 U.S. at 625.

In *Perry*, 482 U.S. 483 (1987), the Court enforced the same arbitration provisions at issue in this case—those in the Uniform Application for Securities Industry Registration (Form U-4) (Joint Appendix ("JA") 15-18) and Rule 347 of the

NYSE—concluding that the Arbitration Act pre-empted state legislation that required resolution of the dispute in court.[1]

The trend favoring the enforcement of arbitration agreements culminated recently in *Rodriguez*, in which this Court overruled its decision in *Wilko v. Swan*, 346 U.S. 427 (1953), which had foreclosed arbitration of certain securities law claims, as reflecting "the outmoded presumption of disfavoring arbitration proceedings." *Rodriguez*, 109 S.Ct. at 1920.

In light of these decisions of the Court, Petitioner's argument that arbitration is inappropriate under the ADEA cannot rest solely on the fact that a statutory right is sought to be enforced. As this Court stated in *Rodriguez*, the Arbitration Act requires that "the party opposing arbitration carries the burden of showing that Congress intended in a separate statute to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies inherently conflicts with the underlying purposes of that other statute." 109 S.Ct. at 1921 (citing *McMahon*, 482 U.S. at 226-27). Petitioner has failed to meet this burden.

As was thoroughly addressed by the Court below, Congress has neither explicitly nor implicitly expressed a disapproval of arbitration of ADEA claims. 895 F.2d at 197-201. The ADEA is silent on the question of arbitration. So too is its legislative history. Had Congress intended to create a federal statutory right as to which arbitration would be inimical, it would have stated so when enacting the original legislation, or in subsequent amendments, particularly those of 1986 (Age Discrimination in Employment Amendments of 1986, Pub. L. 99-592 (October 31, 1986)), or 1990 (Older Workers

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1 Securities professionals are required to register with the self-regulatory organization(s) with which their firms do business. Application is accomplished by completing a Form U-4. 2 N.Y.S.E. Guide (CCH) ¶ 2345 (Rule 345).

Benefit Protection Act, Pub. L. 101-433 (October 17, 1990)).[2] Where Congress has not expressed such an intention, the courts have enforced pre-dispute arbitration of statutory rights involving, *inter alia*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, the Sherman Act, the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*[3]

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2 Recent proposed legislation has more commonly encouraged the use of arbitration—including binding arbitration. *See e.g.*, Administrative Dispute Resolution Act (H.R. 2497 and S. 971), recently passed by both houses of Congress, which speaks at length of the benefits of alternative dispute resolution, and, in Section 585, expressly permits pre-dispute agreements to arbitrate. 136 Cong. Rec. H12967-71 (October 26, 1990). *See also*, proposed Ensuring Access through Medical Liability Reform Act (S. 2934), which provides for binding arbitration of medical malpractice claims. 136 Cong. Rec. S11101-086 (July 30, 1990).

3 *See, e.g. Rodriguez* (Securities Act of 1933); *McMahon* (RICO, Securities Exchange Act of 1934); *Jeske v. Brooks*, 875 F.2d 71 (4th Cir. 1989), *cert. denied*, 111 S.Ct. 43 (1990) (Securities Act of 1933, Securities Exchange Act of 1934, RICO); *Nesslage v. York Securities, Inc.*, 823 F.2d 231 (8th Cir. 1987) (Securities Exchange Act of 1934, RICO); *Iacono, M.D., Inc. v. Drexel Burnham Lambert, Inc.*, 715 F. Supp. 18 (D.R.I. 1989) (enforced agreement to arbitrate a Securities Exchange Act of 1934 claim retroactively under an arbitration clause executed before this Court decided *McMahon*); *Sacks v. Dean Witter Reynolds*, 627 F. Supp. 377 (C.D. Cal. 1985) (Securities Exchange Act of 1934, RICO). Courts are now (since *Mitsubishi*) uniformly enforcing agreements to arbitrate antitrust claims, as well. *See Kowalski v. Chicago Tribune Co.*, 854 F.2d 168, 173 (7th Cir. 1988); *Cindy's Candle Company, Inc. v. WNS, Inc.*, 714 F. Supp. 973, 979 (N.D. Ill. 1989); *Gremco Latinoamerica, Inc. v. Seiko Time Corp.*, 671 F. Supp. 972, 979 (S.D.N.Y. 1987). The courts are divided only with regard to ERISA. *Compare Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988) (enforcing arbitration of ERISA claim) *with Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923, 939 (3d Cir. 1985) and *Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2d Cir.), *vacated and remanded*, 110 S. Ct. 225 (1989) (remanded for reconsideration in light of *Rodriguez*) (finding compulsory arbitration incompatible with statutory scheme).

Petitioner argues that the ADEA is silent regarding arbitration only because *Wilko*, 346 U.S. 427 (1953), *overruled by Rodriguez*, was still in effect and precluded arbitration of statutory claims in 1967 when the ADEA was adopted. This argument is unpersuasive because *Wilko* was also in effect in 1970 when RICO was adopted. That did not preclude this Court from enforcing an arbitration agreement in *McMahon* that involved RICO claims.

Most courts that have addressed the issue have found ADEA claims to be arbitrable. In *Pierce v. Shearson Lehman Hutton, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1882, 1884 (April 26, 1990), the Court concluded that "the arbitrator has sufficient power to structure a remedy to eliminate age discrimination." Moreover, that Court noted that arbitration decisions are reviewable by the courts, and therefore any fear that courts will be removed from the enforcement of ADEA claims is unjustified. *Id.* at 1884.

In *Pihl v. Thomson McKinnon Securities, Inc.*, 48 Fair Empl. Prac. Cas. (BNA) 922 (May 24, 1988), the claimant had signed a Form U-4. As in *Pierce*, the Court could find no legislative intent "to exclude ADEA claims from the dictates of the Arbitration Act." *Id.* at 924.

The plaintiff in *Garfield v. Thomson McKinnon Securities, Inc.*, 731 F.Supp. 841 (N.D. Ill. 1988), had also signed a Form U-4. The Court in that action read the legislative history of the ADEA to *favor* "informal methods of dispute resolution" because the Act requires that claims be submitted to the EEOC initially, in an effort to resolve the dispute by conciliation, conference and persuasion. 731 F.Supp. at 843-44 (citing 29 U.S.C. § 626(d)).

SIA submits that the reasoning of the Court below and of other courts that have found ADEA claims arbitrable is compelling and more consistent with the recent arbitration decisions of this Court than the sole authority cited by Petitioner that denied arbitration of an ADEA claim. In *Nicholson v. CPC International*, 877 F.2d 221 (3d Cir. 1989), the Third Circuit relied on decisions of this Court that predated *Mitsu-*

bishi and involved other statutes, giving only lip service to the more recent decisions favoring arbitration. The dissenting judge concluded that the 1978 amendment to the ADEA, which added a tolling provision to the statute of limitations, was passed "to ensure that claimants achieved resolution of their claims despite delays and not, as the majority suggests, because informal mechanisms were perceived as inherently inferior to judicial resolution." 877 F.2d at 236 (Becker, J. dissenting).

The decisions of this Court relied on by the *Nicholson* court and the Petitioner are clearly distinguishable. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which pre-dated *Mitsubishi*, involved a collective bargaining agreement containing an arbitration provision. This Court refused to enforce the arbitration agreement because the individual claimant had no control over "the manner and extent to which [his] individual grievance [was] presented." *Id.* at 58, n.19. Moreover, the union might not have made the same strategic choices as would the claimant, perhaps because their interests differed or even conflicted. *Id.* Similarly *McDonald v. West Branch*, 466 U.S. 284 (1984), and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), involved collective bargaining agreements and pre-dated *Mitsubishi*[4].

Gardner-Denver also expressed a mistrust for arbitral procedures notably absent from this Court's recent decisions. *Compare* 415 U.S. at 57 with *Rodriguez*, 109 S.Ct. at 1920 and *McMahon*, 482 U.S. at 232-34.

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4 The decisions in *McDonald*, *Gardner-Denver*, and *Barrentine* suggested that Congress had not intended that arbitration be an exclusive procedural remedy under 42 U.S.C. § 1983, Title VII, or Fair Labor Standards Act, respectively. However, Congressional intent is not addressed in depth by the opinions of this Court or of the courts below. It was not until *Mitsubishi* that this Court clearly articulated the requirement that the opponent of arbitration bears the burden of demonstrating that Congress did not intend that the specific statutory right be arbitrated. 473 U.S. at 624-28.

In *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557 (1987), this Court was presented with two federal statutes—the Federal Employers' Liability Act ("FELA") and the Railway Labor Act ("RLA")—which appeared to be in conflict regarding the appropriate forum for resolution of certain employment disputes. The Court upheld the claimant's right to bring a FELA action for damages, concluding that the RLA is not intended to be exclusive. In *Buell*, once again, there was no individual contract requiring arbitration.

Buell is also not controlling here because the Arbitration Act, by its terms, is not applicable to "railroad employees." 9 U.S.C. § 1. Thus, the *Buell* decision required no deferral to the mandate of the Arbitration Act and, like the decisions in *McDonald*, *Gardner-Denver* and *Barrentine*, contains no discussion of the Act's policies. Here, where the policies of the Arbitration Act are fully involved, the *Mitsubishi* line of cases is far more applicable.

The Arbitration Act and its policies control the agreement to arbitrate in this action and require that it be enforced.

POINT II

ARBITRATION IS NOT IN CONFLICT WITH THE POLICIES UNDERLYING THE ADEA

Finding no comfort in the express legislative intent of Congress respecting the ADEA, Petitioner vaguely argues that arbitration is in conflict with the policies underlying the ADEA. Petitioner's arguments in this regard consist primarily of assertions that arbitration, and, in particular, NYSE arbitration, is an inadequate forum for the determination of important rights, in this case, ADEA claims. At least since *Mitsubishi*, however, this Court has rejected similar attacks by others in connection with what they viewed to be "important rights." The courts have left suspicion of arbitration behind and recognized the confidence that Congress has placed in the arbitration process through the Arbitration Act. In light of this current authority, Petitioner's complaints can

only be viewed as an attack on the wisdom of the Arbitration Act itself. This is neither the appropriate forum nor the time for such attacks.

A. Petitioner's Criticisms of Arbitration Have Been Rejected by the Courts.

In his Brief on the Merits, Petitioner expresses several unfounded suspicions in an effort to disparage arbitration generally. But this Court has repeatedly emphasized the benefits of arbitration, even when a statutory claim is involved.

> By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. . . . Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Mitsubishi, 473 U.S. at 628.

When the Arbitration Act was adopted, the House of Representatives recognized that it was a reaction to the "agitation against the costliness and delays of litigation." *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924)). In *McMahon*, this Court concluded that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." 482 U.S. at 232 (citing *Mitsubishi*, 473 U.S. at 628). It is also accepted that "arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims." *McMahon*, 482 U.S. at 232 (citing *Mitsubishi*, 473 U.S. at 633-34). Moreover, this Court has stated that while judicial scrutiny of arbitration awards is limited by necessity, "such review is sufficient to ensure that

arbitrators comply with the requirements of the statute." *McMahon*, 482 U.S. at 232.[5]

Petitioner's specific attacks on NYSE arbitration similarly proceed as if the propriety of securities arbitration had never been addressed by the courts. Many of this Court's decisions upholding the enforceability of arbitration agreements, however, involved securities arbitration. *See, e.g., Rodriguez, McMahon, Perry, Byrd.* Indeed, the arbitration procedures of the NYSE have often been praised by the federal courts specifically in connection with employment disputes. *See, Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826, 829 (D.C. Cir. 1987) ("The arbitrators who serve on the Exchange Arbitration panels are experienced, competent individuals who are fully capable of examining, evaluating and deciding the types of claims being asserted by [the plaintiff].") (quoting affidavit of Edward Morris, Arbitration Director of the NYSE.); *Pierce*, 52 Fair Empl. Prac. Cas. (BNA) at 1884 (a case brought under the ADEA) ("The [NYSE] commercial arbitration procedures are substantially similar to those in a judicial forum and the arbitrator has sufficient power to structure a remedy to eliminate age discrimination"); *Pihl*, 48 Fair Empl. Prac. Cas. at 926 (a case brought under the ADEA) ("The NYSE's arbitration procedure . . . offers an efficient and just means for resolution of ADEA claims").

Thus, the Petitioner's suspicions regarding the arbitration procedures of the securities self-regulatory organizations have already been considered—and dismissed—by the courts.

B. Petitioner's Criticisms of NYSE Arbitration are Factually Unfounded.

The securities industry is one of the most heavily regulated in the world. Indeed, the courts' confidence in the arbitration procedures of the self-regulatory organizations rests in part on the knowledge that the SEC has oversight authority. In

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5 In their brief to this Court, the customers in *McMahon* raised the same criticisms as Petitioner. Brief for Respondent at 24-28. In deciding to enforce the arbitration agreement, this Court considered these criticisms and dismissed them.

McMahon, this Court noted that "[n]o proposed rule change may take effect unless the SEC finds the proposed rule is consistent with the requirements of the Exchange Act, 15 U.S.C. § 78s(b)(2) . . . . and the Commission has the power to 'abrogate, add to, and delete from, any [self-regulatory organization] rule if it finds such changes necessary or appropriate to further the objectives of the Act, 15 U.S.C. § 78s(c)." 482 U.S. at 233. SEC review is intended, *inter alia*, "to insure the fair administration of self-regulatory organization". 15 U.S.C. § 78s(c).

Among the rules of the self-regulatory organizations filed with the SEC are provisions for arbitration of intra-industry disputes. Such provisions have existed and been regularly utilized since the 19th century, and the NYSE has required arbitration of employment disputes between broker-dealers and their registered representatives since 1958. 2 N.Y.S.E. Guide (CCH) ¶ 2347 (Rule 347); Form U-4. For over thirty years, and many years before that on a voluntary basis, arbitration has been the accepted and effective means of resolving employment disputes in the industry.[6]

NYSE arbitration of disputes between broker-dealers and registered representatives is subject to substantially the same rules as disputes between customers and broker-dealers. As discussed above, those procedures have been found fair by this and many other courts.[7] In addition, they have been reviewed and approved by the SEC, which specifically noted their applicability to intra-industry disputes. SEC Order Approving Rule Changes to the Arbitration Process, Securities Exchange Act Release No. 34-26805 (CCH) (May 10, 1989).

6 *See generally*, Serota, *The Unjustified Furor Over Securities Arbitration*, 16 Pepperdine L. Rev. 5105 (May 1989); Goldman, Samuel P., *A Handbook of Stock Exchange Laws* (Matthew Bender & Company 1915), pp. 6, 127.

7 Acceptance of Petitioner's argument would thus suggest that the same securities arbitration procedures are inadequate for registered employees of brokerage firms but adequate for customers. Such a finding would be without factual or legal support and would be inconsistent with the premises of the Court's recent customer arbitration decisions.

Contrary to Petitioner's assertions, the panel designated to hear disputes like that involved in this litigation would currently consist of a majority of arbitrators from outside the securities industry.[8] Moreover, any industry arbitrator would be chosen from a panel that includes, among others, present and retired registered representatives and other non-managerial employees. 2 N.Y.S.E. Guide (CCH) ¶ 2607(a)(3) (Rule 607(a)(3)).

The remaining arbitration procedures are generally identical to those in customer arbitration, and are designed to assure impartiality and fairness.[9] Arbitrators are required to

8 Panels composed entirely of industry members are utilized only where the controversy is "between parties who are members, allied members, member firms or member corporations." 2 N.Y.S.E. Guide (CCH) ¶ 2632 (Rule 632). Neither the record on appeal nor the membership lists in the current N.Y.S.E. Guide (CCH) (Volume 1) reflect that Petitioner falls in any of the categories requiring an all industry panel. Controversies involving "non-members" are heard by panels of three to five arbitrators appointed in the same manner as for customer claims. 2 N.Y.S.E. Guide (CCH) ¶¶ 2632 (Rule 632) and 2607 (Rule 607).

9 Petitioner suggests that a significant difference is that the recently adopted NYSE Rule 637, requiring expanded disclosure respecting arbitration, is not applicable to Petitioner. Of course, this Court's recent decisions upholding securities customer arbitration were made even without such disclosure rule.

Moreover, Petitioner is being less than candid in his assertions that he was unaware of the significance of the arbitration provision in the Form U-4 and in the NYSE Rules. According to the Form U-4 (JA 15), petitioner became a registered representative in 1959. It is incomprehensible that after at least 22 years of employment in the securities industry he was ignorant of self-regulatory organization arbitration procedures at the time he completed the Form U-4.

Indeed, registered representatives are required to study industry rules (including arbitration provisions) and pass examinations respecting them before becoming registered. Securities Exchange Act of 1934

disclose any business affiliation with any parties before them, and may be disqualified for cause for even the appearance of a conflict of interest. *See*, *e.g.*, 2 N.Y.S.E. Guide (CCH) ¶ 2610 (Rule 610). There are trial-type procedures, including the right to be represented by counsel, to cross-examine witnesses and to create a transcript. In addition, the increasingly broad discovery provisions allow parties to subpoena witnesses and documents and to compel the presence of an employee of a member firm, without resort to subpoenas. *See*, *e.g.*, 2 N.Y.S.E. Guide (CCH) ¶¶ 2614-15, 2619-20, 2623 (Rules 614-15, 619-20, 623). These and other procedural safeguards are a result of joint efforts of the SEC and the industry itself, which has a long history of active self-regulation. *See* SEC Release No. 34-26805 (May 10, 1989).[10]

The actual experience with the operation of the NYSE arbitration rules has clearly demonstrated their fairness. The following statistics, which include both customer disputes and intra-industry disputes, were collected by the Securities Industry Conference on Arbitration ("SICA"), Report #6 (August 1989). They demonstrate that the overall arbitration process at the NYSE is efficient and frequently results in awards in favor of customers.

§ 15(b); NYSE Rule 345.13, 345.15(1) and (2). The U-4 itself, on the last page in item 2, contains a certification that the applicant has read, understands and agrees to abide by the rules of the relevant self-regulatory organizations.

Of course, in Item 5, any applicant, including Petitioner, specifically agrees "to arbitrate any dispute . . . that may arise between me and my firm."

10 Petitioner's further argument that because arbitrations are non-public, the leverage of potential adverse publicity is lost, is particularly meritless. First, many awards are now public. Second, Petitioner cannot point to any express or implied legislative intent encouraging the use of publicity for leverage.

NEW YORK STOCK EXCHANGE, INC.

Year	*Total Cases Received*	*Total Cases Concluded Including Settlement*	*Small Claims Received*	*Small Claims Concluded*	*Public Customers Cases Decided*	*Awards in Favor of Public*
1980	367	327	131	110	221	119
1981	477	433	117	134	214	111
1982	558	473	109	113	214	118
1983	713	532	136	122	276	137
1984	1,008	796	176	183	259	113
1985	1,095	962	198	190	424	221
1986	965	1,004	181	205	432	210
1987	1,050	1,000	225	204	378	200
1988	1,623	1,196	263	235	440	228

While the results of NYSE arbitration of employment disputes between firms and registered representatives were, until 1989, not generally published, statistics are available for at least one prior period. They confirm that arbitration of employment claims is just as feasible, fair and efficient as is arbitration of customer disputes[11]:

Year	*Total Cases Involving Registered Represen-tatives*	*Cases Settled*	*Cases in which Registered Represen-tative was Claimant*	*Cases in which Registered Represen-tative Received an Award*	*Cases in which Firm was Claimant*	*Cases in which Firm Received Award*
1986	341	183	79	58	79	59

Arbitration of employment disputes by another self-regulatory organization, the National Association of Securi-

11 Masucci and Morris, "Arbitration at the National Association of Securities Dealers and the New York Stock Exchange," *Securities Arbitration 1989* (Practicing Law Institute).

ties Dealers, Inc. ("NASD"), reflects similar results for the associated persons (registered representatives)[12]:

Year	*Total Cases with Assoc. Persons*	*Cases Settled or Withdrawn*	*Cases with Assoc. Person As Claimant*	*Cases in which Assoc. Person Received Award*	*Cases with Firm as Claimant*	*Cases in which Firm Received Award*
1986	280	177	55	39	48	39

Since May, 1989, arbitration awards within the securities industry have been publicly available and have been published in the *Securities Arbitration Commentator Award Reporter*, a monthly periodical. The following table contains information from NYSE arbitrations between employees and firms, as tabulated from the publicly available information. This data includes arbitration results released by the NYSE from May, 1990 through October, 1990:

Cases with Employee as Claimant	*No. of Awards in Employee's Favor*	*Total Amount of Awards*	*No. of Awards on Counter-Claims by Firm*	*Total Amount of Counter-Claims Awarded*
65	47	$6,445,900	3	$41,000

Cases with Firm as Claimant	*No. of Awards in Firm's Favor*	*Total Amount of Awards*	*No. of Awards on Counter-Claims by Employee*	*Total Amount of Counter-Claims Awarded*
89	75	$2,325,000	12	$1,107,100

These statistics clearly reflect the fairness of the NYSE arbitration procedures. Employees received numerous and substantial awards on their claims and counterclaims.

12 *Id.*

NASD employment arbitrations have had similar results, as the following data, also collected from publicly available information through October, 1990, reflects:

Cases with Employee as Claimant	*No. of Awards in Employee's Favor*	*Total Amount of Awards*	*No. of Awards on Counter-Claims by Firm*	*Total Amount of Counter-Claims Awarded*
21	15	$760,400	2	$77,200

Cases with Firm as Claimant	*No. of Awards in Firm's Favor*	*Total Amount of Awards*	*No. of Awards on Counter-Claims by Employee*	*Total Amount of Counter-Claims Awarded*
18	12	$332,300	2	$38,235,300[13]

While the available data is recent, it reflects that employees have received substantial awards in arbitration proceedings, and have won a significant percentage of their cases.

Petitioner cannot merely suggest that arbitration of ADEA claims is inappropriate. He must point to something in the Act's legislative history that would corroborate his conclusion. He has not done so. Moreover, the relevant authorities and facts clearly establish the opposite conclusion—that NYSE arbitration is fully capable of fairly deciding ADEA claims.

13 Includes one award on a counterclaim in favor of an employee in the amount of $38,233,000. *Prescott Ball and Turben, Inc. v. Kanuth*, Case No. 88-1919, NASD, May 2, 1990.

POINT III

THE STATUTORY EXCLUSION CONTAINED IN THE ARBITRATION ACT DOES NOT APPLY TO THIS DISPUTE

Respondent moved under the Arbitration Act to compel arbitration of Petitioner's claims. The *amici curiae* in support of Petitioner argue that the arbitration agreement in this litigation falls within the exclusion from the Arbitration Act for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

The argument of *amici* for Petitioner is without merit. As an initial matter, the exclusion from the Arbitration Act they rely on applies to arbitration provisions contained in "contracts of employment." In this case, the arbitration provisions are contained in NYSE Rule 347 and in Form U-4. Clearly, the Section 1 exemption does not apply to an arbitration agreement contained in a rule or registration application with a self-regulatory organization.

Moreover, courts have read the exclusory language in Section 1 of the Arbitration Act narrowly. They have almost universally held that in exempting "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce", Congress intended in Section 1 of the Arbitration Act to exclude only those workers "engaged in the movement of interstate or foreign commerce", i.e. the transportation industries. *Tenney Engineering v. United Electrical Radio & Machine Workers of America*, 207 F.2d 450, 452 (3d Cir. 1953); *Malison v. Prudential-Bache Securities, Inc.*, 654 F. Supp. 101, 104 (W.D.N.C. 1987) (refusing to apply the Section 1 exemption to a registered representative of a brokerage firm); *Miller Brewing v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) (employees of a brewery).

In cases involving registered representatives and other securities professionals, courts, including this Court, have regularly enforced, under the Arbitration Act, arbitration agreements in self-regulatory organization applications and rules.[14] *Perry*, 482 U.S. 483 (1987); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972); *Legg, Mason & Company, Inc. v. Mackall & Coe, Inc.*, 351 F. Supp. 1367, 1370 (D.D.C. 1972); *see also Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 704 (2d Cir. 1985), *cert. denied*, 475 U.S. 1067 (1986), *reh'g denied*, 475 U.S. 1151 (1986); *Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047 (2d Cir. 1989) (enforcing the arbitration provisions in Form U-4 and NYSE Rule 347); *McGinnis v. E.F. Hutton and Company, Inc.*, 812 F.2d 1011 (6th Cir. 1987), *cert. denied*, 484 U.S. 824 (1987) (enforcing the arbitration provisions in Form U-4 and NYSE Rule 347); *Pearce*; *Haviland v. Goldman, Sachs & Co.*, 736 F.Supp. 507 (S.D.N.Y.1990); *Henderson v. Tucker, Anthony and RL Day*, 721 F.Supp. 24 (D.R.I. 1989); *Monahan v. Paine Webber Group, Inc.*, 724 F.Supp. 224 (S.D.N.Y. 1989). While the decisions often do not address the exclusionary language, this only suggests that the exclusion was so evidently inapplicable that neither the court nor the litigants raised the issue. Where the issue has been raised, the courts have declined to apply the Section 1 exclusion, concluding that registered representatives are not the types of "workers" envisioned by Congress. *Dickstein v. duPont*, 443 F.2d 783 (1st Cir. 1971); *see also Stokes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 523 F.2d 433, 436 (6th Cir. 1975) (claimants "do not seriously contend that as 'account executives', they fall within the exception from coverage in § 1").

Thus, while this Court has not explicitly addressed this issue, it is well-settled in the lower courts that the Arbitration Act applies to arbitration agreements signed by registered

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14 Petitioner's suggestion in his brief that arbitration is inappropriate for the enforcement of personal—as opposed to economic—rights, therefore lacks support in the case law.

representatives of securities firms. The reasoning of the lower court decisions should be adopted here.

CONCLUSION

Petitioner knowingly signed an agreement to arbitrate all of his disputes with his employer. He has failed to point to any express or implied congressional intent to preclude claims brought under the ADEA from mandatory arbitration. He should be held to his contract.

For the reasons stated above and in Respondent's Brief on the merits, *amicus curiae* the Securities Industry Association respectfully requests that this Court affirm the decision of the Fourth Circuit.

Respectfully submitted,

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